

FCC Mail Room

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² See *Application for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12408, 12410-11, 12434-35, ¶¶ 1, 131, 135, App. B (2008) (“*Sirius-XM Merger Order*”).

the Commission's goals of fostering competition and diversity.³ The Commission stated that it would determine the implementation details for the Leasing Condition at a later date.⁴

3. On October 19, 2010, the Commission explained that the Leasing Condition is an important step in promoting access for new entrants and more diverse SDARS programming.⁵ Based on comments submitted in response to a Public Notice, the Commission detailed how the set-aside of channels under the Leasing Condition would be implemented.⁶ First, the Commission defined the term "Qualified Entity" to ensure that lessees are independent from Sirius XM and to make the criteria for selection of lessees race-neutral.⁷ As the Order stated, by adopting that definition, the Commission sought to avoid constitutional challenges and potential litigation that could delay and detract from progress in satellite radio while expeditiously promoting source, viewpoint, and programming diversity on the Sirius and XM platforms.⁸ Second, the Commission assigned Sirius XM the responsibility for making timely selections of entities that are both qualified for the set-aside and technically compatible with the SDARS platform, but prohibited editorial control over the lessee's programming.⁹ Finally, the Commission provided instructions on the allocation of capacity, established requirements for transparency in the selection process, and offered guidance on certain contract implementation issues.¹⁰

4. MMTC filed a Petition for Reconsideration or Clarification of the *Leasing Condition Order*.¹¹ MMTC asserts that the Commission was vague and ambiguous because the definition of Qualified Entity "does not address whether programmers that have had non-extensive relationships with Sirius XM . . . should be precluded from receiving the opportunity to program a set-aside channel."¹² MMTC also asserts that the Commission's definition of Qualified Entity "failed to take into account or rule upon MMTC's recommendations for non-racial categories of programmers that it argues would enhance diversity" and requests that we include these classifications in the definition of a Qualified Entity.¹³ Finally, MMTC states that the definition of Qualified Entity would create a precedent that could

³ *Id.* at 12410-11, ¶ 135.

⁴ *Id.*

⁵ See *Leasing Condition Order*, 25 FCC Rcd at 14779, ¶ 1.

⁶ See *Media Bureau Seeks Comment on Implementation of Sirius-XM Merger Condition that Four Percent of Audio Channels be Leased to Qualified Entities and Extends the Deadline for Compliance with this Condition*, MB Docket No. 07-57, Public Notice, 24 FCC Rcd 2855 (MB, 2009).

⁷ See *Leasing Condition Order*, 25 FCC Rcd at 14783, ¶ 10 (defining "Qualified Entity" to require that a lessee: (1) not be directly or indirectly owned, in whole or in part, by Sirius XM or any affiliate of Sirius XM; (2) not share any common officers, directors, or employees with Sirius XM or any affiliate of Sirius XM; and (3) not have any existing relationships with Sirius XM for the supply of programming during the two years prior to the adoption date of the *Leasing Condition Order*).

⁸ *Id.* at 14780, ¶ 2.

⁹ See *id.* at 14780, ¶ 3.

¹⁰ See *id.*

¹¹ Minority Media and Telecommunications Council, Petition for Reconsideration or Clarification (filed Nov. 18, 2010) ("MMTC Petition").

¹² *Id.* at 4. MMTC proposes that the definition of Qualified Entity be expanded to include certain entities that have supplied programming to Sirius XM. *Id.* at 5.

¹³ *Id.* at 1. MMTC proposes that the definition of Qualified Entity should include "Historically Black Colleges and Universities," "Hispanic Serving Institutions," "Asian American Serving Institutions," and "Native American Serving Institutions," multilingual programmers, and tribal entities. *Id.* at 5-6. MMTC asserts that these classifications are not based on race but, rather, are based respectively on mission, language, and tribal relationships. *Id.* at 6.

extend beyond the facts of the Sirius XM merger and asks the Commission to rule that the Qualified Entity definition is non-precedential and will be confined to the facts of this proceeding.¹⁴

5. RSS Network Corporation ("RSS") filed an opposition to MMTC's Petition.¹⁵ RSS states that while it has no serious objection to the request that the Commission clarify the definition with respect to pre-existing relationships or limiting the definition of Qualified Entity to the instant proceeding, it opposes MMTC's request to afford "special consideration" to entities that MMTC claims will promote diversity by virtue of "non-racial factors such as their educational mission, language or Native American status."¹⁶ Several other parties filed reply comments to MMTC's Petition.¹⁷ Radio One agrees with MMTC and asserts that we should revise the definition of Qualified Entity to include programmers that have had only "nominal" relationships with Sirius XM during the last two years.¹⁸ iClick2Media asserts that we should set aside the *Leasing Condition Order* in favor of the original definition of Qualified Entity in the *Sirius-XM Merger Order* and exclude Sirius XM from involvement in the selection process.¹⁹ MMTC responds to RSS and reiterates its contention that its proposals advance diversity.²⁰

II. DISCUSSION

6. Reconsideration of a Commission decision is appropriate when the petitioner demonstrates that the original order contains a material error or omission.²¹ To the extent a petition simply repeats arguments that previously were considered and rejected in the proceeding, the Commission may deny it for the reasons already provided.²² As explained further below, we deny MMTC's Petition. To the extent the *Leasing Condition Order* did not specifically or fully address each of MMTC's arguments, we consider them here.

7. We disagree with MMTC's assertion that the Commission's definition of the term Qualified Entity does not address whether programmers that have had non-extensive prior relationships with Sirius XM should be precluded from receiving the opportunity to program a set-aside channel.²³ In

¹⁴ *Id.* at 7. See also *id.* at 8 (Commission should confine the definition to the facts of this proceeding "by taking official notice of the Diversity Committee's proposed Amendment to the DE rules and indicating that it intends to consider the Amendment as a potential paradigm that could supplant the eligible entity definition" in the *Leasing Condition Order*).

¹⁵ See RSS Network Corp., Opposition to Petition for Reconsideration (filed Dec. 1, 2010) ("RSS Opposition").

¹⁶ *Id.* at 2-3. RSS also challenges MMTC's standing to file a petition for reconsideration, asserting that MMTC was not a party to the proceeding. RSS Opposition at 2. Since we are denying MMTC's petition, we need not address RSS's standing challenge.

¹⁷ In addition, in a reply comment, Patrick Sharpless asserts that the Commission should require stringent application of diversity-promoting policies only to companies with demonstrated diversity violations. He argues that we should abandon the qualified entity lessee condition altogether but, if we do not do so, we should deny MMTC's Petition. Patrick Sharpless Reply at 4 (filed Dec. 17, 2010). Because we are denying MMTC's Petition, we do not address Mr. Sharpless' specific concerns.

¹⁸ See Radio One, Inc. Reply at 1 (filed Nov. 29, 2010).

¹⁹ See iClick2Media Reply at 2 (filed Dec. 19, 2010).

²⁰ See MMTC, Reply to Opposition of RSS Network Corp. to Petition for Reconsideration (filed Dec. 13, 2010).

²¹ *Safeview Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 592, 594, ¶ 7 (2010) (citing *Applications of WWJZ*, Memorandum Opinion and Order, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert denied*, 383 U.S. 967 (1966)) ("*Safeview*"); see also *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44, Report and Order, 26 FCC Rcd 1594, 1606-07, ¶ 28 (2011).

²² *Safeview*, 25 FCC Rcd at 594, ¶ 7.

²³ MMTC Petition at 4.

the *Leasing Condition Order*, the Commission addressed the definition of Qualified Entity in detail, including a discussion of the types of relationships that would be disqualifying.²⁴ The Commission explained that Qualified Entities may “not have any existing relationships with Sirius XM for the supply of programming” during the past two years.²⁵ The Commission further explained that “[f]uture applicants can satisfy the definition . . . only if they do not have a prior contractual relationship with Sirius XM” during the preceding two years.²⁶ The Commission concluded that the stated definition would ensure that lessees are independent from Sirius XM and encourage new entry because programmers already carried on the Sirius XM platform are excluded.²⁷ MMTC’s proposed relaxation of the definition of Qualified Entity to include certain entities that have supplied programming to Sirius XM would run counter to this objective. Accordingly, MMTC has failed to demonstrate a material error or omission that merits consideration of its proposed revisions to the definition of Qualified Entity.

8. MMTC has not persuaded us that it is necessary to direct Sirius XM to afford special consideration to companies that will promote diversity by virtue of their educational mission, language, or Native American status.²⁸ MMTC argues that none of these programmers are significantly represented on Sirius XM now and, in MMTC’s view, the public interest would be well served if they were. While the Commission did not adopt the specific criteria proposed by MMTC, the selection criteria clearly state that Sirius XM is expected to consider, among other things, whether a Qualified Entity would offer a diverse viewpoint or diverse entertainment content and would improve service to historically underserved audiences.²⁹ Thus, even though the Commission did not adopt the specific criteria suggested by MMTC, the Commission’s criteria were entirely consistent with the intent of MMTC’s proposals.³⁰ Accordingly,

²⁴ See *Leasing Condition Order*, 25 FCC Rcd at 14783, ¶ 10 & nn.19, 20 (stating that a Qualified Entity’s officers and directors will not have had any personal or family relationships with Sirius XM or Sirius XM’s officers or directors during the two years preceding adoption of the *Leasing Condition Order* and that future applicants can satisfy the definition of Qualified Entity only if they have not had a prior contractual relationship with Sirius XM in the preceding two years).

²⁵ *Leasing Condition Order*, 25 FCC Rcd at 14783, ¶ 10 (emphasis added).

²⁶ See *id.* at 14783, ¶ 10 n.20.

²⁷ *Leasing Condition Order* at 14780, 14783, ¶¶ 2, 10. Similarly, we decline to revise our definition of Qualified Entity to include, as Radio One suggests, programmers that have had only “nominal” relationships with Sirius XM, such as relationships arising from a programming barter or swap. See Radio One, Inc. Reply at 1

²⁸ MMTC Petition at 5-6. See also *supra* n.13.

²⁹ See *Leasing Condition Order*, 25 FCC Rcd at 14786-787, ¶ 18. The *Leasing Condition Order* requires Sirius XM to balance various considerations including, among other things, whether lessees (1) would provide a new source of programming and are new entrants in the mass media industry, (2) would offer a diverse viewpoint or diverse entertainment content, (3) would provide original content or programming of a type not otherwise available to Sirius XM subscribers, (4) would improve service to historically underserved audiences, and (5) would, in Sirius XM’s reasonable judgment, be able to meet its obligations and be able to deliver their proposed mix or type of programming for the duration of the lease term.

³⁰ On April 18, 2011, the Commission announced that Sirius XM implemented the Leasing Condition. See *Sirius XM Implements Merger Condition That Provides Leased Channels to Diverse Programmers* (press release), Apr. 18, 2011, available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0418/DOC-305856A1.doc (“April 18, 2011 Press Release”). The Chairman praised the individual selection of lessees as “a valuable step in increasing the diversity of programming available to satellite radio listeners while promoting access for new entrants and independent satellite radio programming.” *April 18, 2011 Press Release*. Commissioner Clyburn noted, “groups that have been historically underserved will be able to enjoy a wider variety of creative and entertaining options on a national platform.” See *Statement of Commissioner Mignon L. Clyburn on The Election of Qualified Entities for Leases By Sirius XM* (press release), Apr. 18, 2011, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305880A1.doc. The lessees and their proposed programming were described as follows: (1) Howard University (licensee of WHUR-FM and WHUT-TV), One channel each on Sirius and XM – Music and talk programming for the African American community, One channel (continued....)

we do not find that MMTC has demonstrated any material error or omission that would lead us to reconsider the prior decision.

9. In addition, the Commission has addressed MMTC's concern that the definition of Qualified Entity would create a precedent that could extend beyond the facts of the Sirius XM merger.³¹ In the *Leasing Condition Order*, the Commission explained that "[t]he implementation details we adopt for the Leasing Condition are specifically tailored to the unique circumstances of the Sirius XM merger"³² The *Leasing Condition Order* adequately addresses MMTC's concerns, and MMTC has failed to show that the *Order* contains any material error or omission in this regard.³³

10. We dismiss iClick2Media's Reply as procedurally defective. The Commission's rules do not provide an opportunity for parties other than the petitioner to file a reply, and replies may not address matters not raised in the opposition to which they are directed.³⁴ iClick2Media failed to file a timely petition for reconsideration, and its Reply addresses supposed flaws with the *Leasing Condition Order* rather than matters raised in an opposition. Were we to treat the Reply as a petition for reconsideration, it would be untimely because it was not filed within thirty days after release of the *Leasing Condition Order*.³⁵ Even assuming its Reply were properly before us, we would reject iClick2Media's argument that we should set aside the *Leasing Condition Order* and allow the original definition of the term Qualified Entity adopted in the *Sirius-XM Merger Order* to stand.³⁶ As the Commission stated in the *Leasing Condition Order*, we believe that the definition of Qualified Entity, coupled with the selection criteria and processes that the Commission provided, will "encourage the prompt introduction of more diverse programming and program sources" and will promote source, viewpoint, and programming diversity.³⁷

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each on Sirius and XM – Music and talk programming for the African American community, with programs from Historically Black Colleges and Universities; (2) BYU Radio (licensee of KBYU-FM and KBYU-TV), One channel each on Sirius and XM – Music and talk programming for the Mormon community; (3) Eventus/National Latino Broadcasting, One channel each on Sirius and XM – Spanish language talk programming, One channel each on Sirius XM – Spanish language music programming; (4) WorldBand Media, One channel each on Sirius and XM – Spanish language talk programming; (5) KTV Radio, One channel on XM – Korean language music and talk programming. See April 18, 2011 Press Release.

³¹ See MMTC Petition at 7.

³² See *Leasing Condition Order*, 25 FCC Rcd at 14779, ¶ 1.

³³ We also reject MMTC's claim that it was not required to serve its petition on other parties to the proceeding simply because the proceeding was designated as permit-but-disclose for ex parte purposes. Although the permit-but-disclose rules permit parties to submit written communications to the Commission without serving other parties, see 47 C.F.R. §§ 1.1202(b)(1), 1.1206, this does not relieve a petitioner from the obligation to serve a petition for reconsideration on other parties under section 1.106(f) of the Commission's rules, 47 C.F.R. § 1.106(f). Because we deny MMTC's petition, RSS's request that the petition be dismissed on this basis is moot. See RSS Opposition at 2.

³⁴ 47 C.F.R. § 1.106(h). For the same reason, we dismiss the other replies filed by parties other than MMTC.

³⁵ *Id.* § 1.106(f).

³⁶ See iClick2Media Reply at 2.

³⁷ See *Leasing Condition Order*, 25 FCC Rcd at 14782, ¶¶ 7-8. iClick2Media also filed a pleading styled as an "Opinion." Although it would have been timely filed were it a petition for reconsideration, it does not meet the threshold requirements established by the Commission's rules for petitions for reconsideration. Thus, to the extent this pleading could be construed as seeking reconsideration of the decision in the *Leasing Condition Order* to establish a race-neutral leasing condition, we dismiss it as procedurally defective. The Opinion is not styled as a petition for reconsideration, and contrary to section 1.106 of the Commission's rules, the Opinion does not identify clearly the conclusions of law or fact that iClick2Media believes were erroneous or state with particularity the manner in which iClick2Media believes the *Leasing Condition Order* should be changed, nor was the Opinion served on parties to the proceeding. See 47 C.F.R. § 1.106(d), (f). Even if we were to treat this pleading as a properly filed petition for reconsideration, we would deny it because it raises issues that the Commission already (continued...)

11. Finally, we take this opportunity to offer guidance as to the meaning of the word "personal" as that term is used in the *Leasing Condition Order* to describe the scope of the Qualified Entity definition.³⁸ In defining the term Qualified Entity, the Commission stated that "[w]e also expect that a Qualified Entity's officers or directors will not have any personal or family relationships with Sirius XM or Sirius XM's officers or directors during the two years prior to the adoption date of this Order."³⁹ In referring to personal relationships, the Commission did not intend to implicate mere social interactions that do not give a Qualified Entity the ability to exercise undue influence on Sirius XM. Rather, the reference to personal relationships is intended to exclude from the classification of Qualified Entity those applicants who themselves or through their officers or directors have personal relationships with Sirius XM that could result in undue influence.⁴⁰

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309, 310(d), that this *Memorandum Opinion and Order* IS ADOPTED.

13. IT IS FURTHER ORDERED that, pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by the Minority Media and Telecommunications Council is DENIED.

14. IT IS FURTHER ORDERED that the Opposition to the Petition for Reconsideration filed by RSS Network Corp., the Reply Comments filed by Radio One, Inc., Patrick Sharpless, and iClick2Media, and the Opinion filed by iClick2Media are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

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considered and rejected. See iClick2Media Opinion at 2, 4, 7, 9-11; *Leasing Condition Order* 25 FCC Rcd at 14782-83, ¶¶ 9-10; *id.* at 14783-88, ¶¶ 12-23.

³⁸ See *Leasing Condition Order* at 14783, ¶ 10 n.19.

³⁹ *Id.*

⁴⁰ See generally *News Corporation and the DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3285-86, ¶ 43 (2008) (demonstrating that social relationships coupled with co-ownership of personal and real property rendered nominally independent directors subject to undue influence).